

Journal of Air Law and Commerce

Volume 15 | Issue 1

Article 1

1948

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Recommended Citation

Sune Wetter, *Possible Simplification of the Warsaw Convention Liability Rules*, 15 J. AIR L. & COM. 1 (1948)
<https://scholar.smu.edu/jalc/vol15/iss1/1>

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THE JOURNAL OF AIR LAW AND COMMERCE

VOLUME 15

WINTER, 1948

NUMBER 1

POSSIBLE SIMPLIFICATION OF THE WARSAW CONVENTION LIABILITY RULES

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I

THE experiences of World War II have forcefully demonstrated the great potential of air transportation. The vision of those who pioneered in this field has become a reality but, as frequently happens in such cases, this transition has required us to re-examine and re-analyze some of the principles and rules to which we have been adherents. Technological improvements have required many changes in operating methods and techniques, all of which we think are for the better. Changes in the scope and the extent of air transportation may justify changes in rules of liability. Even before World War I the air carriers and their lawyers had under discussion the Warsaw Convention and the rules specified therein. Since the conclusion of hostilities, there is perhaps no subject in the field of private international air law which has evoked as much comment and discussion as the amendment of the Warsaw Convention.¹

The present convention, which dates back to 1929, has for years been evoking a divergence of opinion in interested quarters. There are some who hold that its regulations are satisfactory, at least in principle and taken as a whole. Many Carriers again, although not sharing that view, fear that the net effect of possible changes might be detrimental to their industry, and therefore are inclined to oppose any change; they prefer the devil they know to the devil they do not know. Other Carriers on the other hand are convinced that a revision is called for or perhaps even urgently needed.

¹ Knauth, *Some Notes on the Warsaw Convention of 1929* 14 JOURNAL OF AIR LAW AND COMMERCE 44 (1947); Beaumont, *Some Anomalies Requiring Amendment in the Warsaw Convention of 1929* 14 JOURNAL OF AIR LAW AND COMMERCE 30 (1947); Parker, *The Adequacy of the Passenger Liability Limits of the Warsaw Convention of 1929* 14 JOURNAL OF AIR LAW AND COMMERCE 37 (1947).

While the pros and cons of this matter have been considered and debated, so many influential forces have been mobilized in favor of a revision that it now seems impracticable to advocate a mere "status quo" position. Quite apart from the opinion each of us may have as to the advisability of a revision, we must therefore reckon with a factual development involving more or less radical changes in the present rules. This was the background for the Resolution adopted by the General Assembly of IATA at its meeting in Cairo in October, 1946, providing "that the question of what amendments, if any, to the (Warsaw) Convention are desirable and when the same should be eventually presented be further studied under the direction of the Executive Committee."

Immediately after the adjournment of the meeting of the General Assembly at which this Resolution was passed, the Executive Committee of IATA appointed a special Warsaw Convention Committee. It is now at work and I have the honor to serve as its Chairman. This discussion of the problems incident to a revision of the Warsaw Convention is not made in my capacity as Chairman of that Committee. Everything that I say stands exclusively to my own personal account and is not intended in any way to reflect the views of the Committee. Moreover, it represents only my tentative views at this moment, views which I may be not only willing but perhaps anxious to change after having been further enlightened.

In order not to get lost in the vast field of my subject I am going to confine myself chiefly to one limited but important part of the Warsaw Convention complex, *viz.* to the question of Carriers' liability for damage to passengers and goods carried, and to the limitation of such liability, and I have no ambition or intention to cover the whole ground. Furthermore, I shall limit my observations to principles alone, not only because it appears logical to start a discussion by talking about principles before proceeding to details, but also, because irrespective of that, this Assembly of IATA cannot be expected to devote its time to anything but essentially major problems.

Starting out from the assumption that there is going to be a revision of the Warsaw Convention, one seems to discern two main lines of approach to the question of what the revision should embrace. One line is to use the present layout and wording as a basis and to ascertain what is wrong or lacking, and patch the whole thing together so as to meet any possible new demands — in other words to pour new wine into old bottles. The other and the more radical line would be to disregard as much as possible the existing formula and concentrate on answering the question: What, regardless of present rules, would be the ideal solution of the problems involved? The latter approach is in a way more difficult, because anybody who eliminates traditional concepts from his mind — as under this alternative he very properly should — starts out from nothing except the factual position that is to

be legally regulated. On the other hand this method is more attractive, because it gives one liberty to play around with new thoughts and new ideas for what they may be found worth, when examined in due course and criticized by more tradition-bound brains. Anyhow, in now trying to tackle my subject I am going to adopt the radical line.

It appears then necessary, first of all, to define what are the fundamental requirements of an ideal solution of the problems of establishing the principles governing Air Carriers' liability. Any such solution must, it seems to me, be

- (1) simple; I mention simplicity in the first place with a definite purpose;
- (2) fair to both parties, the public on the one hand and the Carriers on the other; and
- (3) universal and so drawn up that uniform application shall be secured in all the countries concerned.

The importance of simplicity cannot be overrated. A formula that theoretically furnishes a very refined and perfect solution but is at the same time complicated, becomes undesirable merely because of its complexity. Not only does it involve unnecessary work for numbers of people, but it also jeopardizes fairness and universal conformity by opening the way to disputes with uncertain results. I need not comment on the obvious requirement that fairness should prevail, nor on the necessity that any carriers' liability rules applicable to international air transport — perhaps the most fully international of all commercial activities — should be universal and not different in different countries.

Besides the three main considerations thus set forth, others might of course come under discussion, and among these are two in respect of which I would like to explain my reasons for not including them among what I regard as the most essential requirements. One of these considerations bears upon the *status quo* position and upon tradition. There is naturally a certain likelihood that what has already been established and accepted and for some considerable time practiced, represents something valuable in itself, being perhaps not ideal but at least reasonably good. Further, if new ideas are based on *status quo*, or if at least they do not conflict with traditional legal principles, it is certainly easier to "sell" them to the parties and the legislators concerned than if they radically deviated from concepts to which everybody has become accustomed. The other consideration arises from the desirability, much cherished in certain quarters, of unifying the legal rules now applicable to the various kinds of transportation. Such unification might be held to be important enough to justify a revision of the Warsaw Convention in order that such action might pave the way, to the extent possible, for unification in this wider sense.

Personally I am inclined to think that neither traditional Warsaw Convention concepts nor corresponding principles now prevailing in

other fields of transportation should be allowed to weigh very heavily in the balance. Aviation is eminently evolutionary in its nature and in many respects has been and is by necessity also revolutionary. It is young and its traditions are therefore not so firmly established nor so deeply rooted as is the case with transportation on land or on the high seas. It by no means implies any criticism or any underestimation of the meritorious and successful work done by those who have contributed to creating and developing rules for air carriers' liability, if we find today that the great interests involved justify a drastic change, especially for the purpose of achieving a highly desirable simplification. There was a time when it might have appeared utterly impossible to suggest special air carriers' liability legislation which was independent of the *status quo* position and of customary legal concepts. But the situation may be regarded as different today, principally for two reasons. First, aviation has already become such an outstanding factor in the vast majority of countries — and there is a clear tendency for its importance rapidly to increase — that a special handling of any relevant aviation problems stands out as justified and natural. Second, the principles governing legislation are no longer what they used to be in many countries. The slow and cautious development of law to which everybody has grown accustomed has latterly often been superseded by hasty and drastic legislative measures, transforming time-honored legal concepts in a way that has sometimes greatly horrified an old conservative lawyer like myself. The second world war has certainly contributed to this development for better or for worse, and at least in my home-country people are nowadays quite accustomed to the enactment of laws which conflict to such an extent with the principles one used to regard as sacrosanct, that anyone like myself feels stunned — but there it is, and one's first reaction is gradually subsiding.

Hence I do not see why aviation should hesitate to choose its own independent way guided only by what seems to be best from the viewpoints of simplicity, fairness and universality, nor why those in aviation should not try to be bold pioneers rather than timid compromisers.

II

Having arrived at these general conclusions I feel that the present Warsaw Convention principles should, so to say, be given a fair trial by our testing the extent to which they fulfill the requirements just outlined as fundamental. Let us recall the highlights of the liability provisions of the Convention. A concise and clarifying summary of them has been given by Mr. Arnold W. Knauth in an article entitled "Some Notes on the Warsaw Convention of 1929."² In writing on this subject, Mr. Knauth said:

"In effect, the Convention means that in an air disaster the air carrier is required to pay each passenger's full provable damages

² Knauth, *supra* note 1, at 44.

up to an international gold standard figure of which the 1946 equivalent in United States dollars is \$8,291; the passenger recovers up to this sum without any showing of negligence or fault unless the air carrier can prove that it and its servants — including those in the airplane — were free from all fault. This proviso envisages that the carrier may escape liability if he proves that the accident was caused by a bolt of lightning, the unpreventable act of a maniac, an enemy attack or the like. On the other hand, the passenger may recover unlimited provable damages if he can prove that the carrier was negligent in an exceptional degree, stated in the official French text as '*dol*,' presently translated as wilful misconduct.

"As to baggage, the passenger is similarly situated, the standard gold value recoveries being at present \$16.58 per kilo for checked baggage and \$331.67 for whatever the passenger carries on his person or in his hands. As to cargo, the rule is similar to that for ocean vessels under the Ocean Bill of Lading Convention signed at Brussels in 1924 — namely, the air carrier is responsible unless he can make out either of two defenses; proof of how the loss happened and that there was no negligence connected with it (lightning, enemy act, etc.), or proof that the loss occurred because of an error in piloting or navigation of the aircraft by the flying personnel."

To this quotation there should be added the note that the limitation of liability for cargo is assessed at the same amount as for "checked baggage" or "registered luggage."

A few comments upon these main principles seem appropriate.

Due to the nature of air transportation the rules in reality tend to create little less than unconditional, although regularly limited, liability for the Carrier. It will be only in a few cases that the carrier can prove freedom from all fault for itself and its servants. The possibility that the carrier may use as a defense — with regard to registered luggage and cargo — proved error in piloting or navigation is clearly of doubtful value, as such defense might have adverse consequences on the passenger liability side and perhaps even raise the question of "*dol*" with concomitant unlimited responsibility.

Furthermore, the French term "*dol*," defies adequate translation into some languages. Irrespective of that fact, it is apt to be differently understood and interpreted when brought into application under varying legal systems. This circumstance gives rise to the possibility of unlimited liability in cases of gross negligence which were not intended should come within the scope of Article 25 of the Convention. Also it is important to remember that the principles for assessment of damages that rule in some countries differ from the corresponding principles in other countries to an extent that makes the assumed uniformity more formal than real. Nations do not always cherish the same legal concepts and certainly not so when it comes to measuring compensation for loss of human life. In view of that, claimants suing in country A might get nothing or very little whereas, under otherwise exactly similar circumstances, claimants suing in country B might get the Warsaw Convention maximum amounts, or perhaps much

more, owing to the courts' in country B having applied the "dol" paragraph.

There is a more general and an extremely important side of the Warsaw Convention that should be considered. It is a well-known fact, to some extent borne out by my previous comments, that under the Convention neither the Carriers nor the public can know how they stand in the event of an accident until tedious investigations have been completed and doubtful points finally disposed of by negotiations or lawsuits. The disadvantage of this uncertainty can, to a degree, be eliminated by insurance, and if both the Carrier and the public have sufficient coverage, the underwriters become a sort of clearing house, where all complications are finally disentangled. It might easily happen, however, that various insurances overlapped each other and thereby caused undue expense for those who pay the premiums. Irrespective of this factor the whole system entails very considerable unnecessary work, for which of course somebody has to pay.

Let me also recall a special Warsaw Convention feature referring to the documents of Carriage. It is a fact well-known to Carriers' executives — but not always to their clerks — that if certain documentary formalities should not be complied with, the Carrier loses its protection and becomes liable without limitation. A small clerical error might thus entail serious consequences, entirely out of proportion to the fault of the employee.

Adhering to my intention of dealing only with principles, I shall abstain from commenting further on the Warsaw Convention rules. What has already been said seems to establish sufficiently the fact that they are far from simple, far from fair and far from universal. Leaving aside every other consideration, the mere fact that the parties often cannot with any degree of certainty calculate how they stand seems to justify this conclusion.

III

Somebody might feel inclined to argue that from the Carriers' viewpoint the liability rules are of little importance, because the Carriers can always cover themselves by insurance, and even if they do not, their final cost is bound to come out as an average of numerous sums, some of which may be low while others are high. Here however the indirect importance should not be forgotten. It is not a matter of indifference to Carriers if customers feel that they have been badly or unfairly treated, especially if this feeling is quite justified. Customers who have good reason to be discontented are apt to become short-term customers, and would-be customers are likely to hold off when they hear of those experiences. The public cannot be expected to understand that airlines are not to be blamed or held responsible for strange Warsaw Convention rules.

In trying to devise new solutions to the problems confronting us,

let us also take into account sundry special considerations which seem to be highly relevant in this connection.

One of these considerations is insurance. Let us not forget that risks of the kind we have in mind are normally, or at least can always be, insured. The whole question therefore in reality boils down to this: What should be the proper amount of the insurance coverage and who should pay the premium? A further consideration is that air carriers can, of course, offer practically any service for which their customers, the public, desire to bargain. If the public should want a flight doctor on board each plane and free medical attendance, this service could be supplied. If the public wishes to have 200 or 500 pounds of free luggage per person it can also be allowed. The carrier might serve free champagne with all in-flight meals if the passenger should so demand. The regulator is obvious: somebody has to pay for the transportation in question including all the so-called free services rendered, and unless some government should be foolish enough to subsidize the venture — one never knows in our days — it is of course the traveling public itself that has to pay.

In the final analysis, the question of what should be supplied to the public by the Carriers in addition to the transportation itself depends on what benefits the public wishes to bargain for. This applies not only to services of the type just indicated but also to compensation for losses incurred through accident or otherwise.

IV

With due regard to the line of thinking now developed, a quite simple scheme presents itself for consideration, namely that the Carriers should assume absolute and unconditional liability for whatever damage the flight causes to passengers and goods up to certain amounts, which latter, in case of total loss, should be fully payable without any inquiry into the circumstances, and, in case of partial loss, should be payable in proportion to the degree of loss. On the other hand, this liability should at the same time be the only one the Carrier could incur for damage inflicted on passengers or goods and thus also represent his maximum responsibility under any circumstances, even in cases of "dol." Under a system of this kind the form or tenor of traffic documents would be entirely irrelevant to the issue of liability, and traffic clerks' mistakes, now so dangerous, would no longer have to be feared. A rule of unconditional liability would naturally have to be modified in cases where the damage is caused, or contributed to, by the negligence of the injured person. Also, it might theoretically be more acceptable (although this would in reality mean little, if any, difference) to relieve the Carrier from unlimited "dol"-liability only when his servants or "préposés" and not when the Carrier itself has been at fault. In the latter case it might be considered against "ordre publique" to free the Carrier. But such modifications represent details and are here left aside.

For all practical purposes under a system such as that just suggested, Carriers would know how they stand and so would the public. In case of an accident involving total loss the Carrier would have to pay such-and-such an amount, depending on the number of passengers and the quantity of luggage or cargo carried. A partial loss — for instance, an arm, or goods are damaged to some extent — would necessitate a simple assessment of the percentage of the total loss that the damage represents and it would involve no other problem.

As far as the risks here in question are concerned the Carrier would need only one kind of insurance for fixed amounts. Peaks of unknown figure would not come into consideration. The customers would often insure values in addition to those for which the Carrier stands responsible and for which the premium, or rather payment, would automatically be included in the fare or, as the case may be, freight paid, but such additional coverage would be something entirely outside the contract of carriage, although perhaps often arranged through the Carrier at the request and expense of the customer.

The amounts automatically covered as part of the contract of carriage should necessarily be low, as any coverage over and above what a sufficiently large number of airline customers wish to have and to pay for if given the choice, would be unduly costly and therefore unfair to them. It is outside the scope of my present task to express any definite opinion on the appropriate amount of the automatic coverage. With regard to passengers it should be comparatively easy to fix a suitable figure, representing the amount of the protection the most modest category of passengers can be assumed to want and to be willing to pay for as included in the fare. It may be that the present Warsaw Convention limit would be as good a guess as any. It is presumably more difficult to arrive at a generally acceptable figure for goods. However, it might be possible to establish the value per unit of the cheapest category of goods that comes practically into question for air transportation, and for our purpose this would give the necessary guidance. Any value above this, so-to-say, lowest standard value should be taken care of by insurance outside the contract of carriage.

Included as an appendix to the report of the Legal Committee to the present Annual General Meeting of IATA there is a statement by Major K. M. Beaumont concerning risks of liability and loss, declaration of value for cargo and baggage and also valuation charges and excess rates. In his elucidating analysis of these subjects Major Beaumont underlines the necessity, under the prevailing system, of drawing a clear distinction between (A) the Carrier's risk of liability towards his customers (passengers, consignors and consignees), and (B) the customers' risk of loss or damage. If a claim of the latter kind, with which the Carrier is not directly concerned, is paid by the underwriter, he may, under subrogation, proceed against the Carrier alleged to be responsible for the damage, and in that event the Carrier passes

the claims on to the underwriter of his liability under (A), the matter being settled between the two underwriters. If a new scheme of the kind I have just submitted for consideration were adopted, the corresponding distinction would be different: (A) in case of loss the Carrier (or, his underwriter) would always be liable for a fixed amount (the lower bracket) and in case of damage for part of that amount, (B) the customers (or, their underwriters) would always bear any loss or damage exceeding such amount (the higher bracket). There would be no overlapping between the two, unless, of course, the customer had insured the lower bracket which would imply a meaningless double coverage. Expressed in other words, the essence of this scheme is simply that the Carrier would act as underwriter for his customer upon an agreed value basis and the Carrier would be relieved of other liability towards the customer for loss or damage incurred.

This idea does not claim to be new; there is even in other fields of activity at least one existing rule where a somewhat similar principle has been adopted. In the World Postal Convention, concluded in Buenos Aires in May 1939, it is provided in Article 56 that the sender of a registered letter, which has been lost, is entitled to damages to the fixed amount of 50 gold francs without any examination of the extent of the actual loss suffered.

I can easily foresee that several objections might be raised against a reform of this drastic nature. Among them, the fact of its lack of accord with prevailing legal ideas does not worry me too much, if apart from that drawback it should be found to form an acceptable basis for solving problems which, after all, have to be solved somehow. Neither should I be seriously alarmed if I were told that a scheme of this kind would substantially increase Carriers' insurance costs compared with present rates. In the first place a comparison should properly be made not with present Warsaw Convention rates but with rates under some revised Convention with perhaps substantially raised limits. Second, any increased insurance costs might not only represent a relatively small item in the Carrier's budget but might also serve as a link in a long-range policy effectively to contribute towards rationalization and simplification of the relationship existing between Carriers and their customers. Furthermore, under any scheme, whether or not based on present Warsaw Convention principles, the insurance premiums, like any other reasonable expenses for the transportation, in the final analysis will be borne by the public.

Of the other anticipated objections I shall only deal with one, namely, that there is possible danger that a fixed liability system will tempt Carriers to become less careful. Whatever may be the position in other fields of transportation there does not, in my view, exist any such danger in air transportation. An air carrier that would be foolish enough to make itself liable for negligence in observing safety regulations would rapidly

- (1) lose its customers,
- (2) lose its flying personnel,
- (3) get into difficulties with its underwriter, and
- (4) be subject to appropriate action by the relevant civilian aeronautic authority.

There may be other and more weighty reasons for rejecting the line I have suggested. In that case, I can only express the hope that it will prove possible to find some other solution which in practice would be at least reasonably simple, fair and universal.

In conclusion, permit me to stress once more the desirability of achieving the utmost simplicity. Much can be saved in personnel and goodwill if we definitely make up our minds to simplify things. The only people who might complain if our joint efforts are successful in that respect are the lawyers, and I think I can assure you on behalf of my profession that lawyers can find much more interesting and useful work to be done than that of debating and haggling over dubious Warsaw Convention subtleties.